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In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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TABLE OF AUTHORITIES

Cases: Page

Akgun v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990) 1
Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) 7
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 9
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 4
Foley Bros. v. *Filardo*, 336 U.S. 281 (1949) 3, 4
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 9
INS v. *Stanisic*, 395 U.S. 62 (1969) 9
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 7
Udall v. *Tallman*, 380 U.S. 1 (1965) 9
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948) 4, 5

Statutes and regulations:

Act of Aug. 30, 1957, § 1, Pub. L. No. 85-231, 71 Stat. 514 5
Fair Labor Standards Act, 29 U.S.C. 213(f) 5
Labor-Management Relations Act of 1947, 29 U.S.C. 142(1) 7
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(c) 7
National Labor Relations Act, 29 U.S.C. 152(6)-(7) 7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
  42 U.S.C. 2000e(i) 4
  42 U.S.C. 2000e-1 ..... 1, 4
  42 U.S.C. 2000e-2 4
29 C.F.R. (1971):
  Section 1606.1 9
  Section 1606.1(c) 8

Miscellaneous: Page

110 Cong. Rec. 12,811 (1964) 6
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963) 5
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 6

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1. Since the filing of the petition, another court has determined that Title VII applies to discrimination abroad by American employers against American citizens. *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990). Following substantially the same line of reasoning as the decisions cited in the petition (Pet. 14), the *Akgun* court concluded that the "most reasonable and compelling reading" of Title VII's alien exemption, 42 U.S.C. 2000e-1, was that "Congress intended Title VII to apply abroad (*i.e.*, outside any state) with respect to the employment of U.S. citizens (*i.e.*, non-aliens)." Slip op. 6. The court found additional support for this conclusion in the legislative history cited in the petition. *Id.* at 8-9; see Pet. 10-11 & n.7. Noting that "the emphasis of the parties" was "on whether [the court] should adopt the *Boureslan* holding," the *Akgun* court found it-

self "unpersuaded by the majority opinion in *Boureslan*." Slip op. 5.

The *Akgun* decision underscores the reasons why this case is deserving of further review even in the absence of a conflict among the circuits. The Fifth Circuit's decision stands alone, among decisions by four other courts and the administrative interpretations of the statute by the EEOC and the Department of Justice, in holding that Title VII provides no protection for American citizens abroad. The issue is recurrent. As *Akgun* reflects, the Fifth Circuit's reasoning is unpersuasive and thus unlikely to produce any consensus regarding Title VII's application to discrimination abroad—a straightforward question of statutory interpretation that has important ramifications for the careers of many Americans and the national policy against invidious employment discrimination. This Court's review is appropriate to resolve the uncertainty arising from the court of appeals' decision.

2. Respondents attempt to obfuscate the nature of our reliance on Title VII's jurisdictional language and the alien exemption, implying that these provisions should be examined separately to see whether either amounts to a "clear" or "affirmative" expression of extraterritorial intent. *E.g.*, Br. in Opp. 4, 9, 13, 16. Quite simply, our position is this: Title VII's general jurisdictional provisions, by their terms, reach discrimination abroad against American citizens by American employers. The alien exemption, by its terms, exempts aliens employed outside the United States. This combination of provisions is an entirely natural way of pursuing two objectives simultaneously: assuring that Americans will enjoy substantially the same protection from discrimination by American employers abroad that they enjoy in this country, while at the same time avoiding difficulties that could arise from attempts to apply American law to foreign nationals in foreign states. *Read together*, the two provisions also overcome the presumption against

the extraterritorial application of statutes. Whether or not the general jurisdictional language alone would satisfy the presumption, the exemption confirms that the jurisdictional provisions reach Americans employed by American corporations abroad; if they did not, the exemption would be superfluous. Nothing more is required to satisfy a presumption whose purpose is, after all, to provide a means whereby "unexpressed congressional intent may be ascertained." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949).

Respondents' contention that Title VII provides only a "negative inference" as opposed to a "clear" or "affirmative" statement of extraterritorial intention (*e.g.*, Br. in Opp. 7, 9, 12, 17) rests on a misconception of the inquiry that the presumption mandates. The presumption does not impose drafting requirements on Congress—compelling it to use a particular form in order to assure that a statute will apply abroad. Nor does it mandate a search in a statute for a single discrete provision that respondents might characterize as "affirmative" rather than "negative." Rather, it requires courts to examine the statute, aided by the customary tools of statutory interpretation, to determine whether Congress has expressed an intention to apply the requirements of the law abroad. In this case, we submit, the combination of Title VII's general provisions and an exemption that can be given effect only if the statute applies abroad satisfies that standard. Against that general background, we turn to some of the points raised by the brief in opposition.

a. Respondents suggest that the alien exemption could perform two functions consistent with their construction of the statute. Neither is plausible.

First, respondents assert that "[i]t is likely * * * that the alien exemption was intended to *confirm* coverage for aliens residing in the United States." Br. in Opp. 17 n.14. However, the provision of Title VII that protects resident aliens is clear on its face and requires no con-

firmation. See 42 U.S.C. 2000e-2 (prohibiting unlawful employment practices directed at "any individual"); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Even if it were not, it is singularly unlikely that legislators concerned about ambiguity would choose so indirect a way of resolving it; the natural response to such a problem would be to draft a provision that would expressly include resident aliens, not one excluding non-resident aliens.

Second, respondents suggest that the exemption could have been part of a plan to cover American citizens but not aliens in "possessions" of the United States. Br. in Opp. 17-18 & n.15. This unprecedented suggestion encounters a host of problems. Most fundamentally, it is inconsistent with respondents' own view of the presumption against extraterritoriality. Since these possessions are located outside the States and territories of the United States (see 42 U.S.C. 2000e(i)), respondents' argument would entail an extraterritorial application of American law. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948) (noting that application of Fair Labor Standards Act to Lend Lease bases involved regulation "outside the territorial jurisdiction of the United States"); *Foley Bros.* v. *Filardo*, 336 U.S. at 285 (explaining *Vermilya-Brown* as a case in which the presumption against extraterritorial application was satisfied). Respondents offer no explanation of how Title VII could satisfy the presumption against extraterritoriality as to such possessions but not as to any other territory "outside any State," 42 U.S.C. 2000e-1. Respondents' suggestion also contemplates that the Congress that enacted the statute (i) viewed Americans employed by private employers in American possessions on foreign soil to be more deserving of protection from invidious discrimination than Americans employed by the same employers on other foreign soil and (ii) chose to implement that implausible policy choice by means of an exemption for "the employment of aliens outside any State," as

opposed to a provision directly addressing American possessions.[1] There is not the slightest support—in the conditions to which Title VII was addressed or its legislative history—for the notion that the alien exemption was intended for that purpose. Finally, unless Congress enacted the alien exemption with the intention of simultaneously confirming coverage for resident aliens and excluding it for non-resident aliens in American possessions (an even more unlikely legislative contortion), this interpretation of the exemption is inconsistent with the other role that respondents propose for the same provision.

As we noted in the petition, and as every decision except for the one in this case has found, the alien exemption makes sense *only if* Title VII is intended to apply to American citizens employed by American employers "outside any State."

b. The alien exemption's legislative history confirms this view; a committee report indicates that the exemption's purpose is "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in *the employment of aliens outside the United States* by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963) (emphasis added). The potential conflicts were removed by excluding coverage *of aliens* outside the United States—not by providing that the Act did not apply outside the United States. Respondents suggest that this committee report is not authoritative because it related to a bill that "contained specific language that referred to 'foreign commerce' and 'foreign nations'" that was deleted by the time the bill passed the Senate. Br. in Opp. 14-15 & nn.10-11. Accord-

[1] In 1957, Congress amended the Fair Labor Standards Act, the statute at issue in *Vermilya-Brown* v. *Connell*, *supra*, to specify the territory within which that statute would operate. See Act of Aug. 30, 1957, Pub. L. No. 85-231, § 1, 71 Stat. 514 (adding 29 U.S.C. 213(f)). Presumably, if Congress had intended to provide for special treatment of American possessions in Title VII, it would have followed the same direct approach.

ing to respondents, the deletion "evidence[s] a decision by Congress not to have the statute apply to employers operating overseas." *Id.* at 15.

Respondents mischaracterize the nature of the deletion and its implications. The Senate did not delete language focusing on "foreign commerce" or "foreign nations" from the House version of the bill that became Title VII. Rather, it deleted general legislative declarations that set forth the broad purposes of the statute and referred to foreign commerce only in passing.[2] The deletion did not amend the operative provisions of the statute, and it cannot fairly be read to express any view on the substance of the statute that was enacted.[3] In particular, it did not "evidence a decision by Congress not to have the statute apply to employers operating overseas" (Br. in Opp. 15)—unless the Senate also decided to restrict the statute's application to "commerce among the States" or, for that matter, to disavow "the national policy to protect the right of the individual to be free from [invidious] discrimination." See note 2, *supra*. Because the deletion had no effect on the alien exemption, it does not reduce the force of that provision's legislative history.

[2] In their entirety, the declarations deleted by the Senate provided (110 Cong. Rec. 12,811 (1964)):

> Sec. 701. (a) The Congress hereby declares that the opportunity for employment without discrimination of the types described in sections 704 and 705 [of H.R. 7152, 88th Cong., 1st Sess. (1963)] is a right of all persons within the jurisdiction of the United States, and that it is the national policy to protect the right of the individual to be free from such discrimination.
>
> (b) The Congress further declares that the succeeding provisions of this title are necessary for the following purposes:
>
> (1) To remove obstructions to the free flow of commerce among the States and with foreign nations.
>
> (2) To insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution of the United States.

[3] The reasons why these declarations were deleted are unclear to us. It may be that, in view of the controversy over the constitutional footing of the statute, the Senate decided to omit provisions addressing that matter. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 50-52 (1963) (additional views of Rep. Meader); *id.* at 88-94 (minority report); *id.* at 108-110 (separate minority views of Reps. Poff and Cramer).

c. Respondents also suggest (Br. in Opp. 14-15) that in drawing upon the jurisdictional provisions of the National Labor Relations Act, 29 U.S.C. 152(6)-(7), and the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(c), which in turn refers to the Labor-Management Relations Act of 1947, 29 U.S.C. 142(1), Congress should be deemed to have limited Title VII's scope because of decisions holding that the NLRA and the LMRA do not apply to foreign seamen whose foreign-flag vessels stop at American ports. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). While it is true that Title VII's jurisdictional provisions were patterned after similar definitions in other labor statutes, it does not follow that this Court's decisions under those other statutes limit Title VII's reach—or that Congress intended that result.

In both *Benz* and *McCulloch*, the issue was whether American statutes expressed an intention to regulate labor relations between alien seamen and foreign shipowners whose ships called at American ports. In *Benz*, the Court concluded, "Our study of [the LMRA] leaves us convinced that Congress did not fashion it to resolve labor disputes *between nationals of other countries operating ships under foreign laws.*" 353 U.S. at 143 (emphasis added). Similarly, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to *foreign registered vessels employing alien seamen.*" 372 U.S. at 19 (emphasis added). Adhering to the holding in *Benz*, the Court in *McCulloch* found that the NLRA failed to describe "the boundaries of the Act as including *foreign-flag vessels manned by alien crews.*" *Id.* at

20 (emphasis added). This case deals with the converse of the situation presented by *Benz* and *McCulloch*. The issue is whether Americans employed by American corporations abroad retain the protection of an American statute, not whether aliens employed by foreign employers gain the benefit of American law by virtue of brief stops in American territory. Thus, the Court's holdings in *Benz* and *McCulloch* are inapplicable. There is no reason to believe that Congress believed otherwise or attempted, by means of the use of jurisdictional language in Title VII similar to that of other statutes, to deprive Americans of protection from employment discrimination.

3. Respondents challenge our contention that both the Department of Justice and the EEOC have construed the statute to apply to employment discrimination by American corporations against American citizens abroad. Br. in Opp. 9-10 & n.7. In their view, an interpretative regulation promulgated by the Commission in 1970 limited Title VII to persons "domiciled or residing in the United States." Br. in Opp. 10 (quoting 29 C.F.R. 1606.1(c) (1971)). Thus, they contend, the interpretation conveyed by the EEOC's General Counsel to the Senate Foreign Relations Committee in 1975 "was contrary to the EEOC's own regulation that was then in force." Br. in Opp. 11. Respondents also suggest that the interpretation proffered to Congress by the Assistant Attorney General can be disregarded because its "purpose * * * was primarily to persuade Congress that Arab boycott legislation was not needed" and because it contradicted the EEOC's regulation. *Id.* at 10 n.7.

It is respondents (and not the officials who responded in good faith to inquiries from Congress) who have misread the EEOC's prior regulation. While the regulation stated that citizens and non-citizens within the United States were covered by Title VII, it did not say that Americans abroad were not. Nor did it purport to set out the full reach of Title VII. Rather, as a part of a

section entitled "Guidelines on discrimination because of national origin" (29 C.F.R. 1606.1 (1971)), the regulation constituted a portion of the explanation of the EEOC's position that discrimination based on citizenship had the effect of discriminating on the basis of national origin. Thus, the regulation did not speak to the question that the Commission's General Counsel and the Assistant Attorney General addressed in 1975. Respondents point to no occasion on which the Department of Justice or the EEOC has taken the position that Title VII is inapplicable to discrimination by American citizens against American employers abroad. Especially in light of the principle that an agency's interpretation of its own regulations is ordinarily controlling,[4] there is no reason to suppose that the Commission's General Counsel responded to Congress's inquiry regarding Title VII's scope with an unauthorized interpretation of the statute. Similarly, the Assistant Attorney General's testimony was supported by the Justice Department's responsibility for litigating claims under the provisions of Title VII—which parallel those at issue here—that prohibit discrimination by the federal government; the testimony cannot be dismissed as an unfounded attempt to influence legislation.

4. In the petition, we pointed out that the 1984 amendments to the ADEA were based on the assumption that Title VII applies to discrimination against Americans abroad and that the court of appeals' holding would create an anomalous distinction between employment discrimination based upon age as opposed to race, sex, religion, and national origin. Respondents reply with a cryptic suggestion that, unlike the classifications addressed in Title VII, "age is a culturally neutral factor"

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[4] *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (An administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

and that the Senate sponsor of the 1984 amendments was simply incorrect in his understanding of Title VII. Br. in Opp. 21 n.18, 22. See Pet. 13 & n.10. We perceive no basis for the view that age is any more "culturally neutral" than other factors on which employment discrimination may be based—and, evidently, neither did the 1984 Congress. Further, the interpretation of Title VII propounded by the ADEA amendments' Senate sponsor was well founded; it was based upon all of the court decisions that had addressed the issue and testimony by the EEOC's Chairman.

5. We agree with respondents that the policy choices raised by Title VII's application to discrimination overseas are for Congress. See Br. in Opp. 20-23. However, we believe that the statute compels the conclusion that Congress has already spoken to those policy issues. The balance Congress has struck between the goal of equal employment opportunity for all Americans and the concerns raised by the extraterritorial application of Title VII should be respected.

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted.

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